TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~259.~~ 63

JOHN S. SHAW, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 22, 1874.

SUPREME COURT OF THE UNITED STATES.

No. 259.

JOHN S. SHAW, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition	1	1
Traverse	7	2
Amended petition	8	3
Plea of limitation	11	4
Judgment	12	5
Application for and allowance of an appeal	13	5
Claimant's request for findings of fact	14	5
Defendants' request for findings of fact	17	6
Findings of fact and conclusions of law	21	8
Opinion and dissenting opinion	23	10
Certificate	26	12

1 United States Court of Claims.

JOHN S. SHAW
vs.
THE UNITED STATES. } No. 5987.

The petition of John S. Shaw, of the city of St. Charles, in the State of Missouri, respectfully states and shows:

That prior to and on the 17th day of September, 1863, he was the sole owner of the steamboat called and known as the Robert Campbell, jr.; that such steamboat was lying at the port of St. Louis, in the State of Missouri, fully manned, equipped, and furnished for business in her regular duties, on the 17th September, 1863, and on that day she was seized and impressed into the military service of the United States, by the military authorities thereof, while so lying at the port of St. Louis as aforesaid, against the will, wishes, and interest of your petitioner as the owner thereof, as also that the master then in charge thereof, and was loaded with Government stores and supplies, and ordered and sent to Vicksburg, in the State of Mississippi.

2 That such impressment was so made at the city of St. Louis, Missouri, and the same was so made for special military duty down the Mississippi River, below St. Louis, and for a trip from St. Louis to Memphis and Vicksburg, and for special duty between Memphis and Vicksburg, with instructions to report to Capt. J. V. Lewis, assistant quartermaster at Memphis, in charge of transportation. And that said seizure and impressment were so made by order of General Robert Allen, chief quartermaster at St. Louis, Missouri, and by Capt. L. S. Metcalf, assistant quartermaster, and by Captain Charles Parsons, assistant quartermaster. That such steamer left the port of St. Louis, in Missouri, under such impressment and orders, and loaded as aforesaid, and arrived at Memphis, Tennessee, safely, and departed as directed, and left there under instructions to proceed to Vicksburg, Miss., and did so leave Memphis, on or about the 25th day of September,

3 1863, for Vicksburg, and when about opposite Milliken's Bend, on the Mississippi River, on her way to Vicksburg and in her regular line of duty under such seizure, impressment, and orders, was discovered to be on fire, and was entirely consumed and destroyed by fire, and was wholly lost to your petitioner without any fault or negligence on his part, or on the part of agent or employé of his or of said boat, but solely in consequence of the arbitrary seizure and impressment as aforesaid, and the arbitrary control exercised over her by the military authorities of the United States. That said steamer at the time of such seizure and impressment, and also immediately prior to such destruction & loss, was worth the sum of at least seventy thousand dollars in cash, and your petitioner sustained an actual loss, by reason of such seizure and impressment and destruction, to the amount of at least $70,000 in cash. That the United States by such act of seizure and impressment undertook and promised to pay your petitioner

4 the value of said boat, and the same was never returned to your petitioner by the United States, or any officer or agent thereof. That such steamer, prior to and at the time of such seizure and impressment, was insured in various insurance companies to the amount of $25,000, which amount was paid to your petitioner by said companies. That your petitioner afterwards presented a claim against the United States for the loss of such boat as aforesaid, to the proper Department, for allowance and payment, and award was made in his favor for the

sum of thirty-two thousand dollars, which was paid to your petitioner by the United States, and was received by him, objecting to and protesting against the amount so awarded and paid as being insufficient, and has been since endeavoring to obtain an award for the balance of the value of said boat, but without success, and the balance of the value of such boat is justly due and owing to your petitioner from the United States. That your petitioner claims and insists that such insurance was not for the benefit of the United States, and that the United States is not entitled to have allowed the amount of such insurance or any part thereof; and that the whole balance of thirty-eight thousand dollars is justly due to your petitioner from the United States. And that your petitioner has always borne true faith and allegiance to the United States, and has never in any manner given any aid, comfort, encouragement, or countenance to the late rebellion against the Government thereof.

Wherefore your petitioner asks judgment in his favor for the sum of thirty-eight thousand dollars by reason of the premises, or for such other and further judgment and relief in the premises as to the court may seem just & proper.

JOHN S. SHAW.

C. D. COLMAN,
Solicitor for Claimant, Richfield Springs, New York.

STATE OF MISSOURI,
County of St. Louis, ss:

John S. Shaw makes oath & says that he is the petitioner in the foregoing petition subscribed by him, and that such petition and the matters therein as stated are true, according to affiant's best knowledge and belief, and that he is a citizen of the United States, and has always borne true faith and allegiance to the United States, and has never given any aid, comfort, encouragement, or countenance to the late rebellion against the Government thereof; and further says not.

JOHN S. SHAW.

Subscribed and sworn to before me this 2nd day of August, A. D. 1869.

[L. S.]

W. C. COLEMAN,
Clerk County Court.

Filed September 24, 1869.

J. RANDOLPH, *Clerk.*

In the United States Court of Claims, December term, A. D. 1869.

JOHN S. SHAW
vs.
THE UNITED STATES. } No. 5987.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant herein; and, not confessing the same or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of thirty-eight thousand dollars, the said defendants say that they are not indebted to the said claimant in the said sum of money nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

THOMAS H. TALBOT,
Assistant Attorney-General.

Filed January 7, 1874.

8 In the United States Court of Claims, December term, 1873.

JOHN S. SHAW
vs.
THE UNITED STATES. } No. 5987.

Amended petition.—Filed August 26, 1873.

To the honorable the judges of the Court of Claims:

The claimant, by leave of the court first had and obtained, respectfully shows, by way of amendment to the petition heretofore filed in this cause, to wit:

That prior to the seventeenth day of September, A. D. one thousand eight hundred and sixty-three, he, the said John S. Shaw, had caused the said steamboat Robert Campbell, jr., then owned by him as aforesaid, to be insured in and by the Eureka Insurance Company of Pittsburg, Pa., and also in and by the United States Insurance Company of St. Louis, Missouri, and also in and by the Atlantic Mutual Insurance Company, and also in and by the Globe Mutual Insurance Company of St. Louis, and also in and by the Phœnix Insurance Company of St. Louis, Missouri. And in and by each of said companies above named in the sum and amount of five thousand dollars respectively, amounting in the aggregate to the sum of twenty-five thousand dollars.

9 And the claimant here avers and makes known to the court that during the continuance of the said policies, and while the same were in full life and force, to wit, on the 28th day of September, A. D. 1863, the said steamboat Robert Campbell, jr., then and there being in the military service of the United States, was consumed by fire, and became and was then and there a total loss to the said John S. Shaw, the owner thereof.

And the said steamboat, Robert Campbell, jr., having so perished and became a total loss as aforesaid by the happening of one of the perils insured against in each and all of the aforesaid policies, the aforesaid insurance companies and underwriters respectively became and were liable to pay to the said John S. Shaw, each, the sum of five thousand dollars, and which said several sums they, the said insurance companies, severally and respectively paid to the said John S. Shaw on or before the 8th day of December, A. D. 1863.

And the said several insurance companies before named, by reason of such payments and by reason of the said steamboat having so perished while in the military service of the United States, and by virtue of the several acts of Congress in such cases made and provided, were entitled to have and recover of and from the United States the said several sums so paid by them respectively on account of the loss and destruction of the said boat while in the military service and employment of the United States.

And they therefore pray that in addition to the amount heretofore claimed by the said John S. Shaw, the claimant, judgment may be rendered in his favor for the additional amount or sum of twenty-five thousand dollars; five thousand dollars, part thereof, to be for the use and benefit of the Ureka Insurance Company of Pittsburg; five thousand dollars part thereof, to be for the use and benefit of the United States Insurance Company of St. Louis; five thousand dollars, part thereof, for the use and benefit of the Atlantic Mutual Insurance Company; five thousand dollars, part thereof, for the use and benefit of the Globe Mutual Insurance Company, of St. Louis; and five thousand dollars, part thereof, for the use and benefit of the Phœnix Mutual Insurance Company of St. Louis.

And they will pray, &c.

BARTLEY & CASEY,
Attys. in Fact for the several Insurance Cos.

DISTRICT OF COLUMBIA,
City of Washington, ss:

Joseph Casey, attorney in fact, says that the matters set forth in the foregoing amended petition are true, as he verily believes; and that no assignment or transfer of said claims has been made; and that the several sums he believes to be due from the United States.

JOS. CASEY.

Sworn and subscribed to before me this 22d day of August, A. D. 1873.

[L. S.] M. M. ROHRER,
Notary Public.

In the Court of Claims of the United States, Dec. term, 1873.

JOHN S. SHAW, FOR THE USE OF THE EUREKA Insurance Co., the United States Insurance Co., the Atlantic Mutual Ins. Co., the Globe Ins. Co., and the Phœnix Ins. Co.,
v.
THE UNITED STATES. } No. 5987.

Plea.

Now come the defendants, by their Attorney-General, and say that the claimants herein should not further have or maintain their suit against the defendants for the reason that the petition of the claimants, by which the above insurance companies were made parties, was not filed in this court, nor transmitted to it within six years after the claim therein set forth first accrued, being filed August 26, 1873.

Wherefore the defendants ask judgment, &c.

JOHN GOFORTH,
Asst. Atty. General.

Filed Dec. 23, 1873.

AT CHAMBERS.

Allowed.

C. D. DRAKE, *C. J.*

12 In the Court of Claims.

JOHN S. SHAW
vs.
THE UNITED STATES. } 5987.

At a Court of Claims held at the Capitol, in the city of Washington, the eleventh day of May, A. D. 1874, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said petition be dismissed.

By the court.

13 In the Court of Claims.

JOHN S. SHAW
vs.
THE UNITED STATES. } No. 5987.

The claimant, John S. Shaw, and the Eureka Insurance Company, (of Pittsburg, Penna.,) the United States Insurance Company, (of St. Louis,) the Atlantic Mutual Insurance Company, the Globe Mutual Insurance Company, (of St. Louis,) and the Phœnix Insurance Company, (of St. Louis,) severally and collectively appeal to the Supreme Court of the United States. And they pray that the same may be allowed.

And they will pray, &c.

JOS. CASEY,
Of Counsel for the Claimant and the Insurance Companies named.

Filed June 5, 1874.
Allowed.

C. D. DRAKE, *C. J.*

14 In the United States Court of Claims.

JOHN S. SHAW
vs.
THE UNITED STATES. } No. 5987.

The claimant's counsel respectfully pray the Court of Claims to find the following ultimate facts:

1st. That on and prior to the 17th day of September, 1863, the claimant was the sole and lawful owner of the steamboat Robert Campbell, jr., and that on the day last named she was lying at the wharf at St. Louis, Mo., fully manned, equipped, & furnished for business on the Mississippi River, and on the same day she was, by competent military authority, seized and impressed into the military service of the United States.

2nd. That she was loaded with Army supplies and stores for the United States, and left St. Louis under authority and by direction of the military officers of the United States for Vicksburg, Miss., on or about the 25th day of September, A. D. 1863.

15 3rd. That on her said voyage, and while in the possession and service of the United States, she was consumed by fire, & was and became a total loss to the claimant on or about the 28th of Sept., 1863.

4th. That at the time the said steamboat was impressed into the service of the United States, and at the time she was so destroyed, she was worth the sum of ninety thousand dollars, and would have sold for that sum.

5th. That prior to her seizure and impressment, the claimant had caused the said boat to be insured in several insurance companies, amounting in the aggregate to twenty-five thousand dollars, & which, after the destruction of the said steamer, was afterwards paid by the insurance companies to the claimant.

6th. That the claimant afterwards applied to the 3rd Auditor, under the act of Congress approved 3 March, 1849, and its various supplements, for compensation for the loss of said steamboat.

16 7th. That the said Auditor and Comptroller, upon hearing the evidence, valued said boat at fifty-seven thousand dollars, deducted therefrom the amount of the insurance, to wit, the sum of twenty-five thousand dollars, and awarded the balance of thirty-two thousand dollars to the claimant, which he received under protest; and upon petitions for review the accounting officers refused to correct said findings & settlement.

Respectfully submitted.

BARTLEY AND CASEY,
Attys. for Clmt.

Dec. 5, 1872.

(Indorsed:) In the Court of Claims. No. 5987. John S. Shaw vs. The United States. Findings of facts desired by claimant. Filed Jan. 29, 1873. A. H. Bartley and Casey.

17 In the Court of Claims for the United States, December term, 1872.

JOHN S. SHAW
vs.
THE UNITED STATES. } No. 5987.

Request for findings.

1. That the following voucher was given for the purposes and uses and in the manner mentioned therein:

The United States to st'r Rob't Campbell, jr., R. Campbell & Co. owners, St Louis, Mo., Dr.

1863.	Dollars.	Cents.
Oct. 20. For use and service of st'r Rob't Campbell, jr., as a transport on the Miss. River, from Sept. 17, 3 p. m., to Sept. 28, 3 p. m., 1863, making 11 days, @ 241.35 per day, the boat paying all expenses except fuel.....		2,654 85
Add for fuel purchased by boat and consumed during the above service:		
35 cords wood, @ $3 per cord.....	105 00	
12 " " " " @ 3.25 " "	39 00	
	144 00	
Less passage-money received from civilians during above service	50 00	94 00
		$2,748 85

18 I certify that the above account is correct *is correct* and just; that the services were rendered as stated, and that they were necessary for the public service, as per my report of persons and articles for October, 1863.

CHAS. PARSONS,
Capt. and Asst. Quartermaster.

Rece'd., at St. Louis, Mo., the 20th of Oct., 1863, of Brig. Gen. Robt. Allen, quartermaster, United States Army, the sum of twenty-seven hundred and forty-eight (2,748) dollars and eighty-five (85) cents in full of the above account.

(Duplicate) ROBERT CAMPBELL & CO.

2. The claimant presented to the United States a claim for the value of the vessel for whose destruction compensation is sought to be recovered in this suit.

3. This claim having been considered by the Treasury Department, an award of $32,000 was made by that Department.

19 4. The claimant, John S. Shaw, accepted under this award the sum of $32,000 as payment for the destruction of the vessel for whose destruction compensation is sought to be obtained in this suit.

5. That the following is a copy of the award of the Treasury Department in the above-stated case:

Award of Third Auditor, dated May 25, 1864.

TREASURY DEPARTMENT,
Third Auditor's Office, May 25, 1864.

In pursuance of an act of Congress approved 3d of March, 1849, entitled "An act to provide for the payment of horses and other property lost or destroyed in the military service of the United States," as amended and construed by the 5th section of the act of March 3d, 1863, it is adjudged by me that there is due from the United States to John S. Shaw, for the steamboat Robert Campbell, jr., of St. Louis, Mo., burned on the Mississippi River, near Milliken's Bend, on the 28th day of Sept., 1863, while in the military service of the United States, under impressment,

20 the sum of fifty-seven thousand dollars, (57,000.00,) less the sum of twenty-five thousand dollars received by him as insurance on the same, leaving payable by the United States the sum of thirty-two thousand dollars, (32,000.00,) to be paid to John S. Shaw, St. Louis, Mo.

R. J. ATKINSON,
Third Auditor.

7. That the following are copies of the Treasury draft and warrant in the above-stated case, viz:

D'f't No. 8478 *on Treasury warrant No.* 989. [*L. B. W.*

$32,000.] TREASURY OF THE UNITED STATES. [CUT] G.

[VIGNETTE] WASHINGTON, *May* 30, 1864.

At sight, pay to John S. Shaw or order thirty-two thousand dollars.

F. E. SPINNER,
Treasurer of the United States.

No. 8478.] Registered May 30, 1864. [$32,000.

ASS'T TREASURER U. S., *St. Louis.* L. E. CHITTENDEN, *Register of the Treasury.*

(Written across the face:) Paid. Ass't Treasurer, St. Louis, Mo. June 9th, 1864.

(Indorsed:) John S. Shaw.

TREASURY DEPARTMENT.

To the Treasurer of the United States, greeting:

Pay to John S. Shaw or order, out of the appropriation named in the margin, thirty-two thousand dollars, being the value (less the insurance heretofore received by him) of the steamboat Robert Campbell, jr., of St. Louis, lost in service of U. S., as per award 3d Auditor No. 32, agreeably to a certificate of the Comptroller of the Treasury, No. 17784, dated May 26, '64, recorded by the Register. For so doing this shall be your warrant.

Treasury [VIGNETTE.] warrant. No. 980. Appropriation. For payment for horses & other property lost in military service U. S.

Given under my hand and the seal of the Treasury this 27th day of May, in the year one thousand eight hundred and sixty-four, and of Independence the 88th.

[SEAL.]

S. P. CHASE,
Secretary of the Treasury.

W. H. W.
J. J.

R. & E. 28.

$32,000.

Countersigned.

J. D. M.

Recorded, 28.

L. E. CHITTENDEN,
Register.

R. W. TAYLER,
Comptroller.

Remit him at St. Louis, Mo.
30.

Received for the above warrant draft No. 8478, on A. T., St. Louis.
B. J. M.

WILLIAM McMICHAEL,
Asst. Atty. Genl.

21 United States Court of Claims.

JOHN S. SHAW
vs.
THE UNITED STATES.

In this case the court finds the facts to be as follows:

On and prior to the 17th day of September, 1863, the claimant was, and thereafter continued to be, the sole owner of the steamboat Robert Campbell, jr., which steamboat was then lying at the wharf in the port of Saint Louis, Mo., fully manned, equipped, and furnished for business on the Mississippi River.

On that day the said boat was impressed into the military service of the United States by Capt. Charles Parsons, assistant quartermaster of the United States Army, for especial duty between Memphis and Vicksburg, and was loaded with Army stores and troops, and ordered by said Parsons to proceed down the Mississippi River to Memphis, Tenn., and there report to Capt. J. V. Lewis, assistant quartermaster. The orders of said Parsons stated the terms on which the boat was employed. The boat left Saint Louis on said service about the 25th of September, 1863, officered and manned by officers and men employed by the claimant.

While in the said service of the Government she was, on the 28th of September, 1863, consumed by fire, and became a total loss to the claimant, without any fault or negligence on his part, or that of her officers or crew.

At the time of her loss she was worth $70,000, and was insured for $25,000; which amount was paid to claimant by the companies in which the insurance had been effected.

In October, 1863, the account of the United States with said boat, for her use and service as a transport from September 17 to September 28, was allowed and paid by Brig. Gen. Robert Allen, quartermaster United States Army.

In February, 1864, the claimant submitted to the Third Auditor of the Treasury his claim against the United States for the value of said boat at the time she was taken into the service of the Government as aforesaid; which value he alleged was, at the time she was so taken, $70,000.

At the same time he claimed a balance of $859.91 as due him on account of stores lost with the boat when she was consumed, and which he averred had been furnished by the officers of the boat for the subsistence of the crew.

On the 25th of May, 1864, the Third Auditor rendered the following award in favor of the claimant:

"*Award No.* 32.—*2d section of the act of* 3*d March*, 1849.

"TREASURY DEPARTMENT,
"*Third Auditor's Office, May* 25, 1864.

"In pursuance of an act of Congress approved 3d of March, 1849, entitled 'An act to provide for the payment of horses and other property lost or destroyed in the military service of the United States, as amended and construed by the 5th section of the act of March 3d, 1863,
22 it is adjudged by me that there is due from the United States to John S. Shaw, for the steamboat Robert Campbell, jr., of Saint Louis, Mo., burned on the Mississippi River, near Milliken's Bend, on the 28th day of September, 1863, while in the military service of the United States, under impressment, the sum of fifty-seven thousand dollars, ($57,000.00,) less the sum of twenty-five thousand dollars received by him as insurance on the same, leaving payable by the United States the sum of thirty-two thousand dollars, ($32,000.)

"To be paid to John S. Shaw, Saint Louis, Missouri.

"R. J. ATKINSON,
"*Third Auditor.*"

On the 9th of June, 1864, the amount of said award was paid to claimant by the defendants, by a draft.

In the year 1869 the claimant applied to the Third Auditor to review the said award, and allow him the further sum of $13,859.90, which that officer refused to do; and his decision in that regard was concurred in by the Second Comptroller. The sum of $13,859.90 was, in the said application for a review, made up of the above-mentioned balance, claimed as due the claimant on account of stores lost with the boat when she was consumed, and of $13,000 on account of the value of the boat; which latter claim was made by estimating the boat's value at $70,000, and allowing thereon $25,000 insurance money paid the claimant, and $32,000 paid him by the Government as aforesaid, leaving $13,000 additional on the value claimed to be due to claimant.

The payment of the amount awarded by the Third Auditor to the claimant, as above stated, was made to him by draft payable to his order, and endorsed by him, and paid by the defendants; but no receipt was shown to have been given by the claimant for said draft.

At the time of the loss of said boat she was insured in the following insurance companies for the sum of $5,000 in each company, namely: The Atlantic Mutual Insurance Company, the Globe Mutual Insurance Company, the United States Insurance Company, the Eureka Insurance Company, and the Phœnix Insurance Company. In each of the policies issued by said companies, except that of the Atlantic Mutual Insurance Company, the said boat was valued at $38,000; and in all of said policies there was a limitation of $30,000 as the total amount which was allowed to be insured on said boat.

In the policies issued by the Atlantic Mutual Insurance Company and the United States Insurance Company the claimant was insured, but the policies stipulated that the loss, if any, should be paid to Robert Campbell, and the losses under those policies, viz, $5,000 under each, were paid to said Robert Campbell.

In the policy issued by the Eureka Insurance Company the claimant was insured, but the policy stipulated that the loss, if any, should be paid to Robert Campbell & Co.; and the loss under that policy, viz, $5,000, was paid to said Robert Campbell & Co.

In the policies issued by the Phœnix Insurance Company and the Globe Mutual Insurance Company the claimant was insured, the loss, if any, to be paid to himself; and the losses under those policies, viz, $5,000 under each, were paid to him.

The $25,000 paid by said several insurance companies, on account of the loss of said boat, was the same sum which, in the award of the Third Auditor, was deducted from his valuation of said boat on account of insurance-money received.

The claimant's amended petition, praying for a recovery of the said sum of $25,000 for the use and benefit of said insurance companies,
23 was filed in this court on the 26th of August, 1873, with the leave of the court.

And the court find, as

CONCLUSIONS OF LAW,

1. That, on the facts therein, the Robert Campbell, when destroyed by fire, was employed by the petitioner in the performance of a contract of affreightment, then subsisting between him and the United States, and they are not liable for her value.

2. That the claim of the petitioner against the United States, submitted by him to the Third Auditor, was not within the jurisdiction or authority of said officer, under the statute of 3d March, 1849, and his action thereon imposed no liability on the United States, and none has been assumed by them.

LORING, J., delivered the opinion of the court:

The petitioners claim, for the use of certain insurance companies, $25,000, retained on the findings of the Third Auditor from the amount found by him to have been the value of the Robert Campbell when she was burned.

It seems, therefore, quite clear that if the Third Auditor had not jurisdiction of the case, his whole proceeding is legally a nullity and in no way binding on the United States, for they are never parties to the unlawful or unauthorized acts of their officers.

And, therefore, the first question here is, whether the case submitted by Mr. Shaw to the Third Auditor was within the jurisdiction and

authority of that officer, under the statute of 3d March, 1849, and its amendment, (12 Stat., 743,) and as contended for the defendants at the trial in the able argument of counsel. A majority of the court think it was not.

The fact is found that the steamer was impressed, and if that were all, the case would be certainly within the act of 1849, and its amendment, for in the statute the word "impressment" is used in contradistinction to contract, and thus would seem to include every taking by the mere authority of the United States.

But the facts are also found, that, at the time of the impressment, the officer making it contemplated paying a price for the services of the boat, and stipulated and offered it then, and the owner accepted this price, and, for all the time the boat was in the service, received it and receipted for it. The owner was not obliged to do this, and, by doing it, he converted the impressment into a contract to be performed by him, and paid for by the Government, and that was the status of the steamer when she was destroyed by fire. She was in the possession of her owner, and navigated by his master and crew, and performing his contract for the transportation of stores, and was therefore in the service of her owner, like any other chartered vessel performing a contract of affreightment, as decided by the Supreme Court in Russel's Case and in Reed's Case.

Now, the Supreme Court decided in Guttman's Case, not yet reported, and we therefore have held at this term, in transportation contracts, that where the owner of teams remained in possession of them, using them to perform the transportation he had contracted to perform for a price stipulated, that the teams were in his service and not in the service of the United States, and that if the teams were destroyed the case was not within the statute of 1849. Now, this is a like case, and
24 the only difference is that the means of transportation here was a steamer instead of ox or mule trains, and if the case is not within these statutes, then the United States never authorized—were never liable for—the action of the Auditor, nor for $70,000 found by him to be the value of the vessel, nor for any part of it. They were mere strangers to the submission to the Auditor, and are in no way estopped or affected by his judgment or anything done under it.

Then it was contended for the defendants that the Robert Campbell being, when burned, in the possession of her owner performing his contract, he was at his risk, and in this we concur. He who undertakes the performance of a contract undertakes the risk of it, and it was never held that freighters who put goods on board of a vessel to be carried by her for the freight-money, were thereby her insurers for the voyage.

NOTT, J., dissenting:

It has been decided by the Supreme Court that where the officers of the Executive Departments have given a construction favorable to the Government for a long time to a statute, and Congress has regulated its appropriations accordingly, there the true construction of the statute is no longer an open question. It seems to me, (though I confess the Supreme Court may be of a different opinion,) that it is a poor rule which will not work both ways. I also think that a statutory construction favorable to claimants by the executive officers should be even more binding upon the Government than one which is strictly conducive to its own interests.

The statute now under consideration has always been held by the auditing officers of the Treasury to embrace just such cases as the one

now before us. The fact of this construction is sufficiently evidenced by the cases which have been before this court. (Reed's Case, 4 C. Cls. R., p. 132.) The auditing officers at the same time have never extended their favorable construction to cases like that of Guttman, the distinction made at the Treasury apparently resting on the fact that in the one case there was an implied contract springing out of a threatened impressment which the owner did not voluntarily seek, and which was sought and compelled by the Government, while in the other case the contractor voluntarily sought and obtained an express contract, in which he inserted no clause of liability on the part of the Government. The distinction made between the cases, in other words, was, that when the officers of the Government forced an implied contract upon the owner, they in effect made it themselves according to the terms of the statute; but when the owner voluntarily entered into an express contract, he in effect made it himself, and left it open to the construction which would be given to it as between any other two parties. The construction now given to the statute by this court upon the authority of Guttman's Case makes the broader distinction that when the owner retained the possession of his vessel and discretion as to her immediate control or navigation, the risk remained with him as though it were a case of express contract. If the question were an open one, I am inclined to think that this would be the better construction.

But the construction given by the Treasury to the statute in effect made the Government assume the relation of an insurer of a boat thus used for military purposes. The consequence has been that the officers of the Government, when estimating the compensation which they thought proper to allow, have taken into consideration this character of insurer on the part of the Government, and have fixed the compensation at a lower rate than they would have allowed if the owner had been his own insurer.

This court has held the same, (Reed's Case, above cited,) and Congress has year after year appropriated money to give effect to the awards of the Auditor for such damages. I may add that the same construction has been given by different Attorneys-General to the statute, and that in the recent argument of Ex-Attorney-General Evarts before the Judiciary Committee of the House of Representatives in regard to the Alabama claims, he cites the opinion of Ex-Attorney-General Hoar, as to this identical claim for the steamer Robert Campbell, relying upon it as sufficient authority for the subrogation of an insurance company in a right of action against the Government. What all parties have thus united in regarding as the true construction of the statute had better be left, I think, undisturbed, even though the construction is less philosophical and less clear than the one which the judiciary would give to the statute.

In the Court of Claims.

JOHN S. SHAW
vs.
THE UNITED STATES. } No. 5987.

I, Archibald Hopkins, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the attorney of claimant for the allowance of an appeal, as filed in the clerk's office, June 5th, 1874, and of the order of the chief-

justice allowing the same; of the claimant's and defendants' requests for findings of fact; of the findings of fact by the court, and conclusions of law thereon, on which the court founded its judgment; and of the opinion of the court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 30th day of June, 1874.

[SEAL.] ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

(Indorsement on cover:) No. 259. John S. Shaw, appellant, vs. The United States. Court of Claims. Filed 22d September, 1874.

Supreme Court of the United States.

OCTOBER TERM, 1876.

No. 63.

JOHN S. SHAW, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM COURT OF CLAIMS.

BRIEF OF APPELLANT.

BY JOS. CASEY, *Of Counsel.*

Judd & Detweiler, Printers, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1876.

No. 63.

JOHN S. SHAW, APPELLANT,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

On the 17th September, 1863, the claimant's steamboat, "Robert Campbell, Jr.," then lying at the wharf at St. Louis, fully furnished and equipped for service on the Mississippi river, was impressed by a United States quartermaster to carry stores down the Mississippi river. She was ordered to report to the quartermaster at Memphis, Tennessee, and was seized for especial duty between that place and Vicksburg, Miss.

The following are the orders of impressment and sailing:

QUARTERMASTER'S DEPT.,
OFFICE OF TRANSPORTATION,
ST. LOUIS, *Sept.* 18, 1863.

Capt. J. B. MCKINNEY,
St. Louis, Mo.

DEAR SIR: The Government will require the service of the steamer "Robert Campbell, jr.," for a trip to Memphis, Vicksburg, and other points that may be required. Settle-

ment for the service will be made as follows: You will be allowed for the boat $110 per day, all the wages of the crew, and 50 cents each per day for their subsistence. You will also be allowed one-half of the amount received for private passage when subsistence is included in payment; and all receipts for meals, all amounts received for freight you will pay over to the Government.

The Government will furnish fuel. Time to commence, September 17, at 4 o'clock p. m.

Very respectfully,

CHARLES PARSONS,
Capt. and A. Q. M.

QUARTERMASTER'S DEPT.,
OFFICE OF TRANSPORTATION,
ST. LOUIS, *September* 19, 1863.

Capt. of Steamer "Robert Campbell, jr."

SIR: Your steamer is taken in service for especial duty between Memphis and Vicksburg, Miss. Immediately after receiving on board freight assigned you, you will at once proceed to Memphis, Tenn., reporting to Capt. J. V. Lewis, A. Q. M., in charge of transportation. The cattle on board are designed for New Orleans, but they may be taken off at Vicksburg, as that is the understanding with Col. Haines, chief com. at this port.

You will keep a complete roster of your arrival and departure from different ports, as well as complete postage and expense accounts, as a basis for settlement for your services. Government furnishes you with fuel. Your services commenced at 3 p. m., September 17, 1863.

Respectfully,

CHAS. PARSONS,
Capt. and A. Q. M.

The boat under this impressment and orders, received her cargo at St. Louis, and left that port on the 25th September, 1863, and while proceeding on her voyage, without any fault or neglect on the part of the claimant, was consumed by fire on the 28th September, 1863, and became a total loss.

The value of the boat is ascertained by the Court to have been at that time $70,000.

At the time of her destruction she was insured in the

Atlantic Mutual Insurance Company, the Globe Mutual Insurance Company, the United States Insurance Company, the Eureka Insurance Company, and the Phœnix Insurance Company, each five thousand dollars, making $25,000 in all. This insurance, these companies respectively paid to the claimant Shaw, and now claim to be subrogated to his rights to that extent in this case. The Court of Claims, on their applications, allowed them severally to be made claimants in the case to the amount of their interests respectively. After the destruction of the boat the claimant applied to the Third Auditor under the provisions of the act of March 3d, 1849, (9 Stat., 415, § 2,) to be allowed the value of the boat. That officer valued the boat at $57,000; deducted the $25,000 insurance, and awarded $32,000 in favor of the claimant, and which amount was received by him. He made several applications to the Third Auditor for additional allowance on account of under-valuation, and the insurance companies also claimed to be reimbursed the amounts paid by them respectively. All of which was refused, and this suit brought in the Court of Claims.

Two distinct grounds of claim were presented in the Court below.

I. John S. Shaw claimed to recover the difference between the actual value of the boat, and the valuation of the Third Auditor.

II. The insurance companies claimed to recover through Shaw the amount paid by them respectively.

On the trial in the court below, it was held:

1st. That the facts constituted a contract of affreightment, and not an impressment into the military service of the United States.

2d. That under the facts, no liability was incurred by the

United States, under the provisions of the act of March 3d, 1849, or on an implied promise.

Assignment of Errors.

1st. The Court erred in holding that the facts stated constituted a contract of affreightment, and not an impressment into the military service of the United States.

2d. The Court erred in ruling that under the facts stated, the act of March 3d, 1849, imposed no liabilities on the United States.

3d. That the facts stated created no obligation on the United States to pay for the loss of the boats.

Argument.

The case is distinguishable in all its facts and findings, from the cases upon the authority of which it is ruled by the Court of Claims. These distinguishing facts and findings are,—

1st. "On that day (17th September, 1863) the said boat was impressed into the military service of the United States." (Record, p. 8, folio 21.)

2d. She was impressed "for especial duty between Memphis and Vicksburg, and was loaded with army stores and troops, and ordered by the impressing officer to proceed down the river."

3d. While under this impressment, and on this voyage, she was destroyed by fire, without any fault or negligence of the claimant or any person employed by him. (Record, p. 8, folio 21.)

These findings appear to me absolutely conclusive of the case; because, if the boat was "*in the military service of the*

United States by impressment," and was destroyed "by inevitable accident, without fault or neglect of the owner or his agents," then the very case is presented which the act of 1849 contemplates.

That there might be no mistake that steamboats, and railroad engines and cars, were included in such list of property, Congress passed the act of March 3, 1863, § 5. (12 Stat., 743.)

The case of Reed *vs.* The United States, (11 Wall., 591,) and Stuart *vs.* United States, (18 Wall., 84,) were both cases of transportation of military supplies to the Indian country to the troops stationed on the frontier. In the latter case the service was performed under a written contract, full, definite, and specific in its provisions. It, with the nature and character of the service it stipulated for, showed that the property used in the transportation was in no sense in the military service of the United States.

So in the case of Reed, though the contract and terms proposed were acceded to and accepted by the owner under the pressure of threatened impressment, yet it was clearly a case of contract to transport military supplies to the Indian country.

In each of these cases the management, direction, and control of the property was left to the untrammelled will of the owners, except as to the cargo and destination. In this case, it is true, the officers and crew employed by Shaw remained on the boat, and navigated her for the United States For your Honors will see by the order of Captain Parsons that he expressly states that their wages and subsistence are to be paid by the United States.

By the account as settled at the Treasury Department, (Record, p. 6, fol. 17,) our position is maintained and fortified. The United States credits Shaw for fuel found on the boat and consumed while in their service, and debits him with passage money received by him from civilians during the trip, showing with the other facts most conclusively that all par-

ties considered the boat in the possession and military service of the United States.

That the same captain and crew were retained, paid, and subsisted by the United States did not alter the facts of absolute possession and control by the Government.

In the Reed case the employment of the boat was for the conveyance of a specified cargo and delivery to a known and designated point. In our case all the service but the voyage from St. Louis to Memphis was unknown and uncertain. The character of the service afterwards, the time necessary to perform it, where, when, and how were all unknown and uncertain.

This only was known, that she was taken into the military service, and would, as a matter of course, be subject to the orders, direction and control of the military commander in whose district she might be found. She was impressed to go where war was flagrant, and to be there employed as a means of furthering those great military operations then in progress in the lower Mississippi Valley.

Was she in the military service of the United States? It appears to me, with great submission to the Court, that the facts in this record can lead to no other conclusion.

The case of Russell (13 Wall., 623,) is very strongly in our favor. And the reasoning of his Honor, Mr. Justice Clifford, in announcing the judgment of the Court, is as applicable and relevant to this case as it was to the facts in that.

The facts of impressment and use, as his Honor clearly shows, create an obligation to pay from which an implied promise arises, and to enforce which the act of 1849, and those constituting and organizing the Court of Claims were enacted.

II. Are the insurance companies entitled to be subrogated, or to have the amount of their insurance repaid?

That they are, I refer only to the Opinion of Mr. Attorney General Hoar in this case, (13 Opinions, 182,) and Hall & Long *vs.* Railroad Companies, (13 Wallace, 367,) and the cases there cited.

From all the facts stated and considerations suggested it appears to me the judgment of the Court of Claims is erroneous and cannot be sustained.

JOS. CASEY,
Attorney for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1876.

No. 63.

JOHN S. SHAW, APPELLANT,

vs.

THE UNITED STATES.

PLAINTIFF'S BRIEF IN REPLY.

JOS. CASEY,
Attorney for Appellant.

Judd & Detweiler, Printers.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

No. 63

JOHN S. SHAW, APPELLANT,

vs.

THE UNITED STATES.

APPELLANT'S REPLY.

The elaborate brief of the learned Assistant Attorney General is devoted almost exclusively to the legality of the amendment.

The reason and citations of that brief appear to me to be founded upon a misapprehension of the question.

It can need at this day no learned array of authorities or artificial reasoning to establish the proposition that a new, original, and substantive cause of action cannot be introduced by way of amendment.

This admission disposes at once of the long list of Federal and State cases upon the brief of the United States.

It is only necessary to turn to the petitions—the original and amended petitions—to perceive that the questions so ably and learnedly argued do not arise in the cause. He is beating the air or fighting a spectre.

In the Original Petition this insurance is stated, and the amount claimed. (See Record, pp. 1 and 2.)

The amendment did nothing more than to allege that the amount was claimed to be recovered in the name of the original claimant and petitioner for the benefit and use of

the insurance companies, and that they were entitled to subrogation to the rights of Shaw.

Viewed in this aspect, the amendment allowed by the Court of Claims was clearly right, as the following authorities fully demonstrate.

1st. The act of Congress, September 24, 1798, § 32, 1 Stat., 91; 1 Bright., 41, and notes.

And the act of February 24, 1855, organizing, and act of March 3, 1863, reorganizing this court.

Under the statute of 1798 above quoted, the practice has been similar to that under the statute of *joe fails*, in England.

The rule deducible from the cases under the statute, and at common law, seem to me to be, that where the cause of action remains the same, and grows out of the same transactions, the courts will permit amendments, either in form or substance, at any stage of the cause, to permit a failure of justice.

This rule has, in some peculiar cases, been extended, so as even to allow a new and substantive cause of action to be introduced by way of amendment long after the bringing of the original suit.

Where the matter to added, by way of amendment, grows out of the original transaction declared on, it is not for a new cause of action.

Tidd's Practice, p. 696 and note.
Haskins *vs.* Berris, 23 Vt., (8 Washb.,) 673.

This case was trover and new articles of property allowed to be introduced by way of amendment.

Or allowed to allege a conversion.

3 Red, Me., 353.

Or to insert a new ground for damages after general demurrer.

Ten Eyck *vs.* The Del. and Rar. Can., 4 Harr., N. J., 5.

Or a new count on a special agreement, where the original declaration counted in general *indebitatus assumpsit* for work and labor.

Mixer *vs.* Haworth, 21 Pick., 205.

Where a defendant in his plea set out a judgment for a less than the true sum. Allowed to amend long after.

Barnes, 8; 2 Chitty's Rep., 34, *id.* 302; I Dowl. & Ryl., 173.

So in avowry for rent.

See Tidd's Practice, 709; Sayers, 172; 2 Burrows, 756; 1 Dowl. & Ryl., 473.

See also, for the general doctrine as stated by the Supreme Court of the United States—

Eberly *vs.* Moore, 24 How., 147.

Dougherty *vs.* Bentley, 1 Cranch, C. C., 281.

An amendment increasing the damages may be made even after verdict.

Gregg *vs.* Grier, 4 McLean Rep., 208.

The court will set aside a verdict in favor of a plaintiff for a sum greater than the damages laid in the declaration, in order to give him leave to amend by increasing the damages.

7 Term Rep., 132; 17 Johns. Rep., 111; 3 Wend., 356; Graham's Pract., 654–5.

2d. Because the statute of limitations would otherwise bar the claim, is a cogent reason for introducing the matter by way of amendment.

Thus—

Where a plaintiff, declared as executor, on a promise to his testator, and issue was joined on a plea of the statute of limitations, the court of K. B., after two terms, per-

mitted an amendment laying the promise to have been made to himself to save the statute of limitations.

Tidd's Prac., 698; 2 Strange, 890; Fitzg., 193; 1 Barnard, 408, 418.

Tidd's Prac., 697; 1 Wils., 149; Say. Rep., 235.

In Miller *vs.* Watson, 6 Wend, 506, an amendment setting up a special agreement allowed after three trials, and when the suit had been pending for nine years, and after it was held that plaintiff could not recover on the common counts; and on the ground that the statute of limitations would bar a new action.

The case of Williams *vs.* Cooper, 1 Hill, 637, holds that a new cause of action, omitted by mistake, may be introduced by amendment, and this though the statute of limitations has run against it.

The case of Tiernan *vs.* Woodruf, 5 McLean's Rep., 135, in the circuit court of the United States, is so full and clear to the point that it appears to us absolutely decisive of the question.

There the suit was brought originally upon two promissory notes, dated respectively 24th June, 1841. One for $800, payable in twelve months, and one for $2,500, payable in three years. On leave given by the court, the plaintiff filed a new count in 1847, on a third note for $2,500, payable in two years, given at the same time, and for the same consideration; the motion was to strike out this amendment.

The opinion of Judge Wilkins covers the whole ground of such amendments, and sustains the right to make the one above stated.

If these cases are to be regarded of any authority, they are absolutely conclusive of the question. They go far beyond the principle for which we contend in this case.

3d. It is even held that such an amendment may be made in *qui tam* or penal actions in a material matter, the

complaint being fatally defective after a new action is barred by the statute of limitations.

Merriam *vs.* Langdon, 10 Conn., 473.
Bonfield *vs.* Miller, 2 Burrows, 1098.

In Mace *vs.* Lovett, 5 Burr, 2,833, the allowance of the amendment was placed upon the distinct ground, that if not allowed the statute of limitations would bar the action. And the same principle was strongly maintained in Maddock *qui tam vs.* Hammet *et al.*, 7 D. & E., T. Rep., 55.

The same held in 2 Arch. Prac., 231; 6 Term Rep., 543; Tidd's Prac., 711; 2 Chitty's Rep., 23–25.

4th. From even a cursory glance at these authorities, it must be evident to your Honors that no new cause of action was attempted to be introduced by this amendment, for—

1st. It formed a distinct and substantive part of the claim made in the original petition.

2d. It grew out of, and was inseparably connected with and joined to, any claim that could have been possibly set up in the original suit.

5th. In any case, the insurance is payable to the owner, unless otherwise stipulated in the policy. This is fully recognized in the case of Hall & Long *vs.* The Railroad, (13 Wall., 367;) but in that case, as in this, the insurers became the owners of the property by abandonment; or, it being a land policy, by what was equivalent to abandonment in a marine policy, (and see the cases cited by Mr. Justice Strong.)

6th. If the boat was in the military service, either by impressment or contract, the United States is liable. There is no pretence that there was any express contract in this case, for there was not a syllable of evidence to support such an allegation; and in every impressment, under the circumstances of this case, there is an implied contract to pay for

the services, together with the superadded liability of the act of Congress to pay the value of the property, if lost or destroyed while in such military service by inevitable accident, without any fault or neglect of the owner—all of which meets fully in this case.

7th. There is nothing in the cases cited which should bar the claim on account of the acceptance of the amount awarded by Shaw, except so far as it may operate upon his right to recover the balance of the valuation, being $13,000. The amount of the insurance was a different and distinct matter of claim, which the insurance companies had a right to recover through Shaw. They were the owners and beneficiaries, and are not to be estopped and precluded by the unauthorized act of Shaw. He was not their agent or attorney, and could not bind or destroy their rights in that way.

It seems to me, therefore, that it all comes back to the simple question of fact, Was this boat in the military service of the United States when destroyed? If she was, we are entitled to recover.

Respectfully submitted,

JOS. CASEY,
Attorney for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

JOHN S. SHAW, APPELLANT,
vs.
THE UNITED STATES. } No. 63.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the Defendants.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

JOHN S. SHAW, APPELLANT,
vs.
THE UNITED STATES. } No. 63.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE DEFENDANTS.

STATEMENT OF THE CASE.

The claimant's steamboat was impressed into the service of the United States at Saint Louis, September 17, 1863, by an assistant quartermaster, for special duty between Memphis and Vicksburgh, to convey stores and troops, she being then fully manned, equipped and furnished for business upon the Mississippi River. While thus employed, she was destroyed by fire, (cause not stated, except that it was not claimant's fault,) September 28, 1863. She was worth $70,000, and insured for $25,000. Her services have been paid for. In February, 1864, Mr. Shaw submitted to the Third Auditor a claim

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

JOHN S. SHAW, APPELLANT,
vs.
THE UNITED STATES. } No. 63.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE DEFENDANTS.

STATEMENT OF THE CASE.

The claimant's steamboat was impressed into the service of the United States at Saint Louis, September 17, 1863, by an assistant quartermaster, for special duty between Memphis and Vicksburgh, to convey stores and troops, she being then fully manned, equipped and furnished for business upon the Mississippi River. While thus employed, she was destroyed by fire, (cause not stated, except that it was not claimant's fault,) September 28, 1863. She was worth $70,000, and insured for $25,000. Her services have been paid for. In February, 1864, Mr. Shaw submitted to the Third Auditor a claim

for her value, $70,000, and for $859.91 for stores on board at the time of loss, purchased for subsistence of the crew by the officers of the boat. In May, 1864, the Third Auditor awarded him $57,000, less $25,000 insurance; and the balance, $32,000, was paid him by draft June 9, 1864. In 1869, the claimant applied to the Third Auditor to review the award, and allow the $13,859.91 before rejected, but he declined to do so, and was sustained in his refusal by the Second Comptroller.

The award was made under the act of March 3, 1849, c. 129, §§ 2 and 3, as amended by act of March 3, 1863, § 5, below printed. The insurance was in five policies of $5,000 each. One was issued by the Atlantic Mutual and one by the United States Mutual, to the claimant, loss (if any) payable to Robert Campbell, and they were so paid. In the policy of the Eureka Insurance Company, issued to claimant, the loss was payable and paid to Robert Campbell & Co. The Phenix Insurance Company and the Globe Insurance Company insured the claimant and paid the loss to him. In each of the policies, except that first named, the boat was valued at $38,000; and in every one of them $30,000 was the limitation of the amount to be insured upon her. (Record, 8–10.)

September 24, 1869, Mr. Shaw filed his original petition (Record, 1, 2) stating the value of his boat at $70,000; that he had received $32,000; that "such insurance was not for the benefit of the United States, and that the United States is not entitled to have allowed the amount of such insurance, or any part thereof; and that the whole balance of $38,000 is justly due to your petitioner from the United States." At their December term, 1872, the Court of Claims held (8 Ct. of Clms.

Rep., 488) that he was not entitled to recover, but that the insurance companies might do so, in his name, upon appropriate allegations and proof. In this decision he acquiesced. August 26, 1873, he filed what is entitled an "amended petition," &c., (Record, 3, 4,) setting out the amounts of the insurance policies; the destruction of the boat, whereby there "was then and there a *total loss to the said John S. Shaw*, the owner thereof;" that the insurers thereby became liable to *him*, each in the sum of $5,000, which they severally paid to him before December 8, 1863; by reason whereof, and of the acts of Congress in the premises, the companies are entitled to recover of the United States the several sums so paid; and that *they* (the corporations) "pray that, in addition to the amount heretofore claimed by said John S. Shaw, judgment may be rendered in his favor for the additional amount of $25,000," *i. e.*, $5,000 to the use of each of the insurance companies. The United States objected to this amendment, (9 Ct. of Clms., 301,) and, after it was allowed, interposed to it the plea of the statute of limitations. (Record 5.)

CONCLUSIONS OF LAW.

1. That, on the facts therein, the Robert Campbell, when destroyed by fire, was employed by the petitioner in the performance of a contract of affreightment, then subsisting between him and the United States, and they are not liable for her value.

2. That the claim of the petitioner against the United States, submitted by him to the Third Auditor, was not within the jurisdiction or authority of said officer, under the statute of March 3, 1849, and his action thereon imposed no liability upon the United States, and none has been assumed by them.

The second section of the act of March 3, 1849, c. 129, is this:

"SEC. 2. *And be it further enacted*, That any person who has sustained, or shall sustain, damage by the capture or destruction by an enemy, or by the abandonment or destruction by the order of the commanding general, the commanding officer, or quartermaster, of any horse, mule, ox, wagon, cart, boat, sleigh, or harness, while such property was in the military service of the United States, either by impressment or contract, *except in cases where the risk to which the property would be exposed was agreed to be incurred by the owner;* and any person who has sustained, or who shall sustain, damage by the death or abandonment and loss of any such horse, mule, or ox, while in the service aforesaid, in consequence of the failure on the part of the United States to furnish the same with sufficient forage, and any person who has lost, or shall lose, or has had, or shall have, destroyed by unavoidable accident, any horse, mule, or ox, wagon, cart, boat, sleigh, or harness, while such property was in the service aforesaid, shall be allowed and paid the value thereof at the time he entered the service: *Provided*, It shall appear that such loss, capture, abandonment, destruction, or death, was without any fault or negligence on the part of the owner, and while it was actually employed in the service of the United States." (9 Stats., 415.)

The next section enacts "That the claims provided for under this act shall be *adjusted* by the Third Auditor, under such rules as shall be prescribed by the Secretary of War," &c.

The act of March 3, 1863, c. 78, § 5, thus amends the above:

"SEC. 5. *And be it further enacted*, That section two of the act approved March 3, 1849, entitled 'An act to provide for the payment of horses and other property lost or destroyed in the military service of the United States,' shall be construed to include the steamboats and other vessels, and 'railroad engines and cars,' in the property to be allowed and paid for when destroyed or lost under the circumstances provided for in said act." (12 Stats., 743.)

BRIEF.

I.

Inasmuch as the appeal brings up the whole record, we propose first to discuss the legal propriety of the amendment suggested and allowed by the Court of Claims, (Drake, C. J., strongly dissenting—8 Ct. of C., 488–493,) whereby the insurance companies were substituted as the parties in interest instead of Mr. Shaw. Though the cause was decided favorably to the Government upon other grounds, the admissibility of the amendment or substitution is fairly presented by the record, and may, therefore, properly be here considered, and thus perhaps afford a guide for future action, and avoid other appeals.

The question is whether or not the Court of Claims, after determining adversely to the petitioner upon the claim set out in his original petition, had legal authority to permit a substitution of new parties who presented an entirely different claim. We contend that this change of claimants and of cause was legally erroneous, and

therefore reviewable here. If the *discretion* of the Court of Claims to permit or to refuse amendments is unlimited or if this was within its discretion, then there is no occasion further to consider this branch of the subject; but if its discretion is limited and this amendment went beyond the prescribed limits, then it becomes an error of law to be here corrected. (Phillipse *v.* Higdon, Busbee, (No. Car.,) Law, 380.) The statute of Vermont follows precisely, almost, the phraseology of the Federal statute. The court of that State said, in Emerson *v.* Wilson, 11 Verm., 359: "Amendments are usually within the discretion of the court, and the granting or refusing of them cannot be questioned in any other tribunal; but when an amendment is made and the court had *no* power to grant it, the party affected may be entitled to relief; and although the improper exercise of a discretionary power may be without remedy, the exercise of a power where there is and can be no such discretion is erroneous. Thus, allowing an amendment which changes entirely the form of action and introduces a new count for a new cause of action, not contained in the original declaration, has been adjudged to be such an error that the judgment of the court making the amendments was reversed. (Carpenter *v.* Gookin, 2 Verm., 495.) An amendment essentially changing the parties would be liable to the same objection, if the change of parties would have the effect to introduce a new cause of action not contained in the original declaration."

So in Maine: "In our practice amendments are not permitted to introduce a new cause of action. It is within the discretion of the judge of the district court to permit amendments in all cases where by law the writ or declaration is amendable; and this court does

not revise that exercise of discretion; *but if an amendment be permitted which the law does not authorize, the party has a right to except.* This amendment must be regarded as unauthorized, because it introduces a new cause of action." (Newell *v.* Hussey, 18 Maine, 250; Herrick *v.* Osborne, 39 Maine, 232; Avery *v.* Bowman, 39 N. H., 393; Farr *v.* Wheeler, 20 N. H., 569; Carpenter *v.* Gookin, 2 Verm., 495; Sumner *v.* Brown, 34 Verm., 196.)

Assuming that, if the amendment was erroneously allowed, the error can be corrected here, we shall proceed to argue that it was erroneous, because (1) it introduced a *new party* to the record.

R. S., § 1072, requires that "The claimant *shall, in all cases, fully* set forth in his petition the claim * * ; *what persons* are the owners thereof *or interested therein;* when and upon what consideration such persons became so interested; that no assignment or transfer of said claim, or of any part thereof or interest therein, has been made, except as stated in the petition; that *the claimant* is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; that the claimant and, where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all times borne true allegiance," &c., &c. * * * * * * *

The claim so stated is to be verified by affidavit. These provisions were contained in the original act of February 24, 1855, c. 122, § 1, establishing the Court of Claims, (10 Stats., 612,) as amended by the act of March 3, 1863, c. 92, § 12, 12 Stats., 767.

The Federal statute of *jeofails*, passed September 24, 1789, c. 20, § 32, 1 Stats., 91, now found in R. S., § 954, authorizes the amendment or disregard of "any defect or want of *form*" in the process or pleadings; notwithstanding which, the "court shall proceed and give judgment according as the right of the cause and matter *in law* shall appear to it, without regarding any such defect or want of form," &c. The next two sections, 955 and 956, direct the course of procedure in case of the death of a plaintiff or defendant.

The Court of Claims considers itself, (*vide* Molina *v.* U. S., 6 Ct. of Clms., 275,) and it undoubtedly is, embraced among the tribunals whose practice is to be regulated by this statute.

The question now presented does not appear to have heretofore arisen in this court, but it is not perceived that the provisions of this section (§ 954) differ essentially from those found in most of the States, except that in many of the latter the right to amend is not confined to mere "defects or want of form." The State decisions are, therefore, pertinent.

The statutes of Maine, New Hampshire, Pennsylvania, and Wisconsin allow amendments to be made so that all defects of form, mistakes, &c., may be corrected, that the persons and cause may be rightly understood.

The statutes of Alabama and Vermont are almost, *in totidem verbis*, identical with the act of September 24, 1789, c. 22, § 32, and R. S., § 954.

Yet in none of these States has a change of parties been held to be authorized by such phraseology, nor except as expressly given by later enactments. Thus, the Alabama court ruled, in Teer *v.* Sandford, 1 Ala., 525, that the plaintiff could not amend by striking out the

name of the person for whose use the suit was instituted. Parity of reasoning would require that the name of such beneficiary could not be inserted by way of amendment. That decision was under their statute of 1824. (Clay's Dig., 322, §§ 53, 54.) An act allowing the names of plaintiffs or defendants to be stricken out took effect January 17, 1853. Yet that court held, in Leaird *v.* Moore, 27 Ala., 326, 328, (A. D. 1855,) that this did not permit a sole plaintiff to be stricken out and another one substituted. Affirmed, as to substituting husband for wife. (Friend *v.* Oliver, *id.*, 532.) Or an assignee for the assignor, although the suit was originally brought by the latter to the former's use. Stodder *v.* Grant, 28 Ala., 416, 420, where the court say: "We will not now undertake to define the exact limit of our present statute of amendments; but we think it quite clear that it was not intended to go to the extent of making a total change of parties, either plaintiffs or defendants. The phraseology employed (Rev. Code Ala., §§ 2808, 2809) does not admit of such extraordinary latitude." (Crimm *v.* Crawford, 29 Ala., 626; Tarver *v.* Smith, 38 Ala., 135; *id.*, 310; *ex p.* Collins, 49 Ala., 70, 71.) So, in Emerson *v.* Wilson, 11 Verm., 359; Newell *v.* Hussey, 18 Maine, 250; Treat *v.* McMahon, 2 Maine, 120; Winslow *v.* Merrill, 11 Maine, 127; Ayer *v.* Gleason, 60 Maine, 207, (A. D. 1872;) Pickett *v.* King, 4 N. H., 212; Elliot *v.* Clark, 18 N. H., 421; Wilson *v.* Wallace, 8 S. & R., 53; Chamberlain *v.* Hite, 5 Watts, 373. In Kelley *v.* Eichman, 3 Whar., 419, a suit brought in the names of A. and B. "for the use of A.," it was held inadmissible to strike out the name of B. after proof that the contract was made with A. alone. In Horbach *v.* Knox, 8 W. & S., 30, an error in the Christian name of one of the plaint-

iffs could not be amended; but, upon a renewal of the motion, after the act of 1846, it was allowed upon proof that it was a clerical mistake. (Horbach *v.* Knox, 6 Penn. St., 377; Little *v.* Virginia, &c., Co., 9 Nevada, 318.)

It can hardly be denied that the amendment did introduce new parties, since the Court of Claims were unanimously of the opinion that the original petitioner had established no claim, (8 Court of Claims, 488,) and that it was only by admitting the insurance companies to the record that any recovery could be had in any event.

2. This amendment substituted a new cause of action for that set out in the original petition. (Houseman *v.* North Carolina, 15 Peters, 50, 51.) It has been very generally considered that the most liberal construction of the most comprehensive statutes of *jeofails* did not permit of this being done. Cassell *v.* Cook, 8 S. & R., 287; Newlin *v.* Palmer, 11 S. & R., 102; Ebersoll *v.* King, 5 Binney, 53; Kester *v.* Stokes, 1 Miles, 67; Wood *v.* Anderson, 25 Penn. St., 407; Gardner *v.* Post, 43 Penn. St., 19; Maxwell *v.* Harrison, 8 Geo., 61; Williams *v.* Hollis, 19 Geo., 313; Ramirez *v.* Murray, 5 Cal., 222; Wiley *v.* Moore, 2 Wend., 259; Carpenter *v.* Gookin, 2 Verm., 495; Ball *v.* Claflin, 5 Pick., 303; Butterfield *v.* Howell, 3 N. H., 201; Lawrence *v.* Langley, 14 N. H., 70; Brown *v.* Leavitt, 52 N. H., 619, (A. D. 1873,) and numerous cases there cited; Milliken *v.* Whitehouse, 49 Maine, 527; Cooper *v.* Waldron, 50 Maine, 80; Farmer *v.* Portland, 63 Maine, 46, (A. D. 1873,) and cases cited *supra* and *infra*. Nor is it sufficient that the two causes arose out of the same transaction, if they rest upon legal

grounds essentially different. (Diehl *v.* McGlue, 2 Rawle, 337; Guilford *v.* Adams, 19 Pick., 378; Magoun *v.* Lapham, *id.*, 420, 421.) Thus, assumpsit for rent, or for use and occupation, cannot be amended so as to declare for mesne profits. (Ramirez *v.* Murray, 5 Cal., 222, and Williams *v.* Hollis, 19 Ga., 313.) Nor in a suit against the sheriff for false return of bail taken can a count be added for refusing to deliver the bail-bond. (Eaton *v.* Ogier, 2 Maine, 46.) Trover cannot be changed into an action for negligently losing attached property. (Goddard *v.* Perkins, 9 N. H., 488.) Nor one to recover statute penalty for cutting trees into a general trespass *qu. cl.* for breaking close and cutting the trees. (Melvin *v.* Smith, 12 N. H., 462.) Nor one for value of building destroyed by order of municipal officers into one for a destruction of it by a mob. (Farmer *v.* Portland, 63 Maine, 46.) See, also, Mason *v.* Waite, 1 Pick., 452; Vancleef *v.* Therasson, 3 Pick., 12; Milliken *v.* Whitehouse, 49 Maine, 527; Cooper *v.* Waldron, 50 Maine, 80.

The test is said to be, what did the party *intend* to declare for when he instituted proceedings? The Vermont court thus state it: "Courts in this, as in other States, are inclined to go to the extreme verge of liberality in allowing parties so to amend their pleadings as to permit the trial and determination of *the real subject-matter in controversy, upon which the action was originally really based;* that which the party brought his action to recover for, and what he and his attorney supposed he was declaring for." Sumner *v.* Brown, 34 Verm., 198, (A. D. 1861,) where it was held that it would be a *legal error* to admit the introduction of a new cause of action by way of amendment. Duncan *v.* Helm, 21 La. Ann., 303, (A. D. 1869:). "The cause of action, which is to be

collected from the whole count, and which is sought to be introduced through the medium of a new count, was manifestly *not in the contemplation of the pleader when the original declaration was filed*, a test which may always be applied, in relation to proposed amendments, with decisive effect." Kester *v.* Stokes, 1 Miles, 74; Supervisors *v.* Decker, 34 Wisc., 378, (A. D. 1874;) Nat. Bank of Chemung *v.* Elmira, 39 How'd (N. Y.) Prac., 376, (A. D. 1869.) Especially should this not be done where its effect is to let in a claim already barred by the statute of limitations. In giving the opinion in Gorman *v.* Judge, &c., 27 Mich., 140, 141, (A. D. 1873,) Christiancy, Ch. J., remarked: "But long before this amended declaration was filed, or leave to file it applied for, the statute of limitations had taken effect upon and barred the cause of action set forth in it. Had a new suit been then commenced, for the same cause of action, it is not pretended that it could have been maintained; and we see no substantial difference between the commencement of a new suit and the allowance of this amended declaration, under these circumstances, for the same cause of action. It is clear enough that the only purpose and object of allowing the amended declaration, instead of putting the plaintiffs to a new action, after they had submitted to a nonsuit, was to prevent the statute bar of the action. We do not think the statute can be evaded by any such necromancy; and to permit the shallow fiction of a relation back to the commencement of the suit, under such circumstances, to nullify an act of the legislature, would be discreditable to the judiciary;" citing "Wright *v.* Hart, 44 Penn. St., 454; Trego *v.* Lewis, 58 Penn. St., 463; Williams *v.* Randon, 10 Texas, 74; Wilbanks *v.* Willis, 2 Rich., (So. Car.,)

109; 42 N. H., 70." See, also, Weston *v.* Worden, 19 Wend., 648; Shock *v.* McChesney, 4 Yeates, 507; Wood *v.* Anderson, 25 Penn. St., 226; Phillipse *v.* Higdon, Busbee, Law, (No. Car.,) 380.

The rule in chancery is thus stated by the court of Alabama: "We think the rule must be regarded as settled by the authorities, that 'if, during the pendency of a suit, any new matter or claim, not before asserted, is set up and relied upon by the complainant, the defendant has a right to insist upon the benefit of the statute, until the time that the new claim is presented; because, until that time, there was no *lis pendens*, as to that matter, between the parties.'" King *v.* Avery, 37 Ala., 173, (A. D. 1861.) The statute was pleaded in bar of the amendment of which we complain. (Record, 4, folio 11.)

That a new cause was introduced by the amended petition is apparent upon inspection. Indeed, it can hardly be called an *amendment* with any propriety, since it introduced new parties to set up a new claim. It was "tantamount to the institution of a new suit, and not an amendment of the old cause of action." Crimm *v.* Crawford, 29 Ala., 626. "Amendment implies that there is something defective which requires correction before the plaintiff can legally proceed. If there is nothing to correct, there can be no amendment." (Bachus *v.* Mickle, 45 Ala., 446.)

Here the owner of a steamboat set up, in distinct terms, a right to her full value, and to an unpaid balance thereof of $32,000, she having been lost while in the military service of the United States. This claim he litigated to a final decision against himself. Thereupon, *without striking out any of his original petition*, he amends, at the suggestion of the court, by praying that "*in addi-*

tion to the amount heretofore claimed by said John S. Shaw, the claimant, judgment may be rendered in his favor for the *additional* amount or sum of $25,000," to the use of the corporations mentioned. (Record, 4, top.)

If no new party, or new cause, was introduced by the amendment, why was it made after the court had determined, upon the merits, that the original claimant had no cause upon the facts proved?

II.

The statutes of March 3, 1849, and 1863, give no rights to any person other than the *owner* of the property destroyed. Mr. Shaw was "the sole owner of the steamboat." (Record, 1.) The insurance companies had no proprietorship in her. The statute only provides for payment to "any person who has lost, or shall lose, or has had or shall have destroyed, by unavoidable accident," any of the enumerated property, "provided it shall appear that such loss, &c., was without any fault or negligence on the part of the *owner*," &c. Within the meaning of the statute, the insurance companies did not *lose* the vessel, nor have any property of theirs consumed when she was burned. So long as she continued *in esse*, the boat was the property of John S. Shaw, and the insurers had no rights to or in her. They suffered *consequential* damage from her destruction, but not a loss of the vessel herself. They suffered a pecuniary loss, but none of the specific property mentioned in the statute.

For the sums which they were obliged to pay upon their policies, the premiums they had received were the consideration and equivalent which they had themselves fixed upon as sufficient. Had not the loss been within the terms and scope of the policies issued by them, and

for which the premiums were received, there would have been nothing for them to pay. The Government was not an insurer of the companies, nor did it stand in the position of a common carrier; hence Hall's case, 13 Wall., 367, does not apply.

III.

If the amendment did not substitute the insurance companies as claimants instead of Shaw, but he continues the claimant of record, then the right of recovery must depend upon his action and position. They can receive only such recovery as he can obtain; and as he has no right, they cannot recover. (Stodder *v.* Grant, 28 Ala., 416.)

IV.

The use of this steamboat for military transportation must be assumed to have been through a contract between the Government and the owner, or else the Court of Claims had no jurisdiction, since it is not authorized to award damages for torts, whether in the form of an "impressment" or any other application of force by a military officer. (Reed *v.* U. S., 11 Wallace, 603.)

As Mr. Shaw retained the possession, navigation, and command of the boat, the arrangement, in contemplation of law, was a mere affreightment, sounding in contract, and not a demise of the vessel. (Reed *v.* U. S., 11 Wallace, 600, 601, and cases there cited; U. S. *v.* Russell, 13 Wallace, 623.)

V.

If Mr. Shaw was a contractor for the use of his boat as a transport, then neither he nor his property was "in the military service of the United States" within the

meaning of the statutes aforesaid. (See the opinion of this court in Guttman's case, 9 Court of Claims, 60, 68–71.)

A fortiori, the insurance companies were not within the intent of these statutes. They not only had no property in the Federal service, but "the risk to which the property would be exposed was agreed to be incurred" by them; otherwise they would have paid nothing.

VI.

The Court of Claims had no jurisdiction. (United States *v.* Kimball, 13 Wallace, 645.)

VII.

Analogous to U.S. v. Kaschus 15 How. 34

The acceptance of the $32,000 was an adjustment of a disputed claim and bars any further recovery. (United States *v.* Adams, 7 Wallace, 463; United States *v.* Child, 12 Wallace, 232; United States *v.* Clyde, 13 Wallace, 35; United States *v.* Justice, 14 Wallace, 535; Savage *v.* United States, 92 United States; Sholes *v.* State, 2 Chand., (Wis.,) 182; Calkins *v.* State, 13 Wis., 389; Marvin *v.* Treat, 37 Conn., 96.)

The claimant could not re-open the question of liability, at any rate, until he restored the $32,000 received and put the parties in *statu quo ante*. (Farmers' Bank *v.* Groves, 12 Howard, 51; Potter *v.* Monmouth Insurance Company, 63 Maine, 440; Bisbee *v.* Ham, 47 Maine, 543, and cases there cited.)

Claimant cannot retain the $32,000 improperly paid him by award of the Third Auditor, and then try his luck for the rest of his alleged claim.

The insurance companies, in any event, can only claim

the benefit of what Shaw is entitled to recover. Coming into the case as they do, they take it *cum onere*, and are bound by his previous acts. (Stow *v.* United States, 5 Court of Claims, 371. Opinion of Attorney-General Hoar, 13 Ops., 182, cited by claimant.)

EDWIN B. SMITH,
Assistant Attorney-General.

No. 63—2

O